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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 831

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

LITTLE ROCK PACKING COMPANY, CHRIS FINKBEINER AND OTTO FINKBEINER, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Acting Solicitor General prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above case on February 25, 1953.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 74–84)[1] are reported at

[1] The record for purposes of this petition is in two volumes—the main record in the court below (referred to here as "R.") and the supplemental record of appellees (respondents) (referred to here as "Supp. R."), at the end of which the proceedings in the court below are bound.

104 F. Supp. 527. The opinion of the Court of Appeals (Supp. R. 40–46) is reported at 202 F. 2d 234.

JURISDICTION

The judgment of the Court of Appeals (Supp. R. 47) was entered on February 25, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Respondents' pay plan for each of their office employees provided a fixed hourly rate of pay for the first forty hours of work in a workweek and one and one-half times that rate for any additional hours of work, with a guarantee that the employee's total earnings for a week's work would be not less than a specified amount. In actual operation, no employee ever worked in excess of the maximum weekly hours covered by the guarantee or was ever paid in excess of the guarantee, so that there was never any occasion to rely on the stipulated hourly rate in determining the overtime compensation actually paid. Each employee was paid the specified weekly guarantee regardless of the varying number of overtime hours worked. In a few isolated instances when an employee did not work every day of the scheduled workweek, he was paid a pro rata percentage of the weekly guarantee for each day worked, rather than at the stipulated hourly rate. No attempt was made to record the

number of overtime hours actually worked. Respondents, with the few above-mentioned exceptions where a full workweek was not worked, simply recorded the number of hours needed to equal the maximum weekly number covered by the guarantee, their records in this respect being admittedly in violation of the record-keeping requirements of the Act.

The first question presented is whether the stipulated hourly rate was the true "regular rate" for the purposes of the overtime requirements of Section 7 of the Fair Labor Standards Act.

2. Whether a permanent injunction against further violations of the Fair Labor Standards Act is properly vacated notwithstanding admitted recent violations of the injunction, and in the absence of a showing of any changed circumstances or special hardship.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, as amended, are set forth in the Appendix, *infra,* pp. 27–29.

STATEMENT

The present proceedings arose out of an action brought initially by the Administrator of the Wage and Hour Division to enjoin respondents from violating specified provisions of the Fair Labor Standards Act. After a full trial, judgment was entered on September 14, 1942, perma-

nently enjoining respondents from future violation of the overtime compensation, the record-keeping, and illegal shipment provisions of the Act (R. 14–15). No appeal was taken from this judgment (R. 9).

The contempt petition, filed October 24, 1951 (R. 88), complained of violations of the overtime compensation and record-keeping provisions of the injunction as to office employees, and sought an order requiring respondents to pay these employees the amounts withheld from them in violation of the injunction and to compensate the Government for the expense of investigating and litigating the contempt proceeding (R. 1–7). The response denied any violations and prayed that respondents "be relieved of the injunction * * * for the reason that said injunction is unduly burdensome and onerous," and because of the alleged compliance with the injunction (R. 16–17).

As the Court of Appeals stated, "There is no dispute in the evidence" (Supp. R. 42). The parties have stipulated that the provisions of the Act have been applicable to each of the employees in issue during all of their employment subsequent to the issuance of the injunction (R. 51, 72–73). Each employee has worked under an arrangement involving a specified hourly rate of pay for the first forty hours of work each week, one and one-half times that rate for extra work, and a guarantee that the total earnings for a week's

work would be not less than a specified amount, generally the amount that would be due at such rates for 50 hours of work, regardless of the number of hours actually worked (Fdgs. 7, 8, R. 79–80).[2] With a few isolated exceptions, each employee has been recorded as having worked the full number of hours covered by the guaranteed amount (R. 21–41). It is conceded (Fdg. 7, R. 79) and found (Fdg. 8, R. 80) that these records have not accurately shown the actual number of hours worked (R. 46, 20).

No employees worked in excess of the hours recorded (Stip., R. 72–73), and none ever received pay in excess of the guaranteed weekly salary (R. 21–41). There was, therefore, never any occasion to rely upon the stipulated hourly rate in determining the overtime compensation actually paid. On the only other occasion when the stipulated hourly rate might have been given some operative effect, it was disregarded. Thus, in the few isolated instances when an employee did not work every day of the scheduled workweek, he was paid a pro rata portion of the weekly guarantee for each day worked, rather than at the stipulated hourly rate, and part of his pay was credited on the records as overtime even though no overtime was worked (Exhs. E, I, and J, R. 37, 39, 41).

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[2] At various times, the guarantees for various employees have been changed from 50 or 51 hours to 46, 47, or 48 hours (Exhibits A, B, R. 21–35).

The undisputed evidence also shows that when the statutory minimum wage was increased to 75¢ by the 1949 Amendments to the Act, respondents arbitrarily reduced the total number of recorded hours by an hour or two, so that the payroll increase directly attributable to the increased minimum wage would have little, if any, impact on any employee's previous compensation (R. 68). For example, when it was necessary to increase one employee's hourly rate from 64¢ to 75¢, *i. e.*, a 17% increase, her total pay was increased only from $35.20 to $36.75, or only 4%, although her actual working hours remained the same (R. 33, 45; and see Exhs. G, L, and Q).

At the close of the evidence in the contempt proceeding, the district court concluded that the overtime provisions of the injunction and the Act were not violated by the plan used by respondents subsequent to the injunction (Concl. 3, R. 84). The court recognized that the record-keeping practices violated the injunction, imposed a fine of $1, and ordered defendants to pay $400 to the Government for the expense of investigating and prosecuting the contempt proceeding (Fdg. 9, R. 81; Concl. 4, 5, R. 84). It further concluded that the testimony and "attitude, manner, and demeanor of the officers and employees" gave "no reason to believe" that there would be "future violations of the Act" (Fdg. 12, R. 83). It concluded that "under the circumstances" it would

be "unjust and inequitable, as well as unnecessary, to retain the injunction in force any longer, and that it should be dissolved" (Fdg. 12, R. 83).

The Government appealed from that part of the decree (R. 85–86) which (1) failed to adjudicate appellees in civil contempt for violating the overtime compensation provisions of the injunction, and (2) vacated the injunction. Respondents did not appeal the contempt adjudication. The court of appeals affirmed, ruling (1) that although the payroll records were "technically inaccurate because failing to show the number of hours actually worked," respondents' pay plan was valid (Supp. R. 46), and (2) that the district court "did not abuse its discretion in vacating the injunction" because "the errors in the payroll records" pertained only to a relatively few of respondents' employees and these errors were found by the district court to be "the result of an honest but mistaken belief * * * that the records as kept were in full compliance with the Act," and were not likely to recur in the future (Supp. R. 46).

REASONS FOR GRANTING THE WRIT

[1(a)] In sanctioning a wage plan under which the purported hourly rate of pay never in fact serves as a basis for computing the employee's earnings, the decision below represents a substantial departure from basic principles established by this Court for determining the "regular rate"

on which the overtime requirements of the Fair Labor Standards Act depend. Several decisions of this Court between the years 1942 and 1948 carefully delineated the limitations on the scope of the so-called *"Belo"* case (*Walling* v. *Belo Corp.,* 316 U. S. 624, rehearing denied, 317 U. S. 706). In *Overnight Motor Co.* v. *Missel,* 316 U. S. 572 (decided the same day as the *Belo* case) and in six subsequent decisions, this Court, recognizing the potentialities for abuse of the *Belo*-type contract to circumvent the statutory overtime requirements, has repeatedly emphasized the principles underlying, and the narrow application of, the *Belo* decision. *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419, rehearing denied, 326 U. S. 804; *Walling* v. *Harnischfeger Corp.,* 325 U. S. 427; *Walling* v. *Helmerich & Payne,* 323 U. S. 37; *149 Madison Avenue Corp.* v. *Asselta,* 331 U. S. 199, modified on another point, 331 U. S. 795; *Walling* v. *Halliburton Co.,* 331 U. S. 17; *Bay Ridge Co.* v. *Aaron,* 334 U. S. 446.

This line of decisions has made it unmistakably clear that the requirements of Section 7 of the Act are not met simply by setting up a *Belo*-type plan on the employer's books. The *Belo* decision did not sanction a contract which stipulates "a fictitious regular rate consisting of a figure somewhat lower than the rate actually received" (*Walling* v. *Helmerich & Payne,* 323 U. S. at 41–42), or an "arbitrary" contract rate

when the employees "do in fact regularly receive the higher rate" (*Walling* v. *Harnischfeger Corp.*, 325 U. S. at 430–431), or a contract "regular rate" which "is never actually paid" (*Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. at 425).

These decisions, squarely applicable here, make clear that the ostensible hourly wage of the employees in this case, because it was not in fact the "regular rate" on which their pay was computed, did not effect compliance with the Act. The employees in this case never worked enough hours to earn more than their salary guarantee; their ostensible hourly rate of pay was thus never effective as a basis for computing overtime. And, demonstrating sharply that the hourly rate was a fiction, the employer automatically credited each employee each week with the number of hours of work required to earn the guarantee, ignoring the number of hours actually worked.

In only one of the above six decisions of this Court rendered since the *Belo* decision has the stipulated hourly rate been held to be a valid or actual "regular rate." That one case is *Walling* v. *Halliburton Co.*, 331 U. S. 17. A determining factor in both the *Belo* and *Halliburton* cases was that the stipulated hourly rate was actually operative in computing and determining the amount of compensation actually paid and that employees frequently earned in excess of the weekly guar-

antee by application of the stipulated hourly rate. In both of those cases there was, therefore, tangible evidence that the stipulated hourly rate, and not the weekly guarantee, actually determined the compensation paid the employee. In the *Halliburton* case the hourly rate determined the compensation paid in 20% of the workweeks (331 U. S. at 21), and in the *Belo* case the hourly rate was similarly determinative in a substantial but unspecified number of workweeks (316 U. S. at 631–632). This significant factor was fully discussed in the *Halliburton* opinion, and specifically noted as a reason for the *Belo* decision:

> In Belo itself, the specified basic hourly rate was held to be the actual regular rate because, as to weeks in which employees worked more than 54½ hours, the specified rate determined the amount of compensation actually payable [331 U. S. at 22].

The court below expressly recognized that under this Court's decisions "Contracts of employment in which the stipulated hourly rate bears no relation to the compensation guaranteed by the contracts are violative of the Act" (Supp. R. 45). But the basis on which the court distinguished the instant case would make that standard of validity meaningless. For the court apparently concluded that the requisite relation existed here between the stipulated hourly rates and the guaranteed salary solely because the amounts an em-

ployee would ordinarily earn at the stipulated hourly rate were not much less than the guarantee. But when the employee always receives his fixed salary, and never anything in addition for his varying periods of overtime work, it obviously means nothing to him or to his employer whether the disparity between his earnings at the hourly rate and at the guarantee is great or small. To distinguish between the cases where the hourly rate is absurdly low in relation to the guarantee and the cases, such as this one, where the hourly rate produces earnings more nearly equal to, but never exceeding, the guarantee, is to have the cases turn simply on the skill of the contract draftsman in arithmetic calculations, rather than on the single material question—whether the hourly rate is in fact the basis for compensation. The standard of reasonable relationship between the hourly rate and the guarantee has meaning only if the relation is such that, as applied to the range of the employees' actual weekly working hours, the hourly rate, at least sometimes, has real effect in measuring compensation paid by producing earnings in excess of the guarantee. Obviously, if the employee always works the same number of hours each week, there is no occasion for recourse to a *Belo*-type plan, for hourly rates without any guarantee will produce a uniform weekly income. Just as a guarantee is meaningless in such a situation, where there is no varia-

tion in working hours, so the stipulated hourly rate is meaningless if the working hours, even though varying somewhat, never fluctuate high enough for the hourly rate to produce more than the guarantee.[3]

Not only do respondents' contracts lack the two vital factors present in *Belo* and *Halliburton* (an actually operative hourly rate and accurate

[3] Added by the Act of October 26, 1949, Section 7 (e) of the Fair Labor Standards Act, codifying, with no presently material qualification, this Court's decisions defining the limits of a valid *Belo*-type pay plan (see *infra*, pp. 16–17), provides (63 Stat. 912, 29 U. S. C., Supp. V, 207 (e)):

"No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified."

The express restriction of such plans to employees whose duties "necessitate irregular hours of work," reflects the assumption that any valid plan with a true "regular rate" will sometimes produce earnings in excess of the guarantee. This requirement of fluctuating hours obviously derives from the *Belo* and *Halliburton* cases which involved newspaper and oil field workers, respectively, whose duties called for widely varying hours. Thus, even apart from the requirement of a true "regular rate," it is doubtful whether a case involving such minor variations of hours as those in the instant case meets the express "irregular hours" requirement.

records of the number of hours actually worked), but there is further unmistakable evidence in the record of the artificial character of the stipulated rate. Thus, when the statutory minimum wage was increased from 40 to 75 cents per hour in January 1950, respondents arbitrarily manipulated the hours recorded on their books to avoid the impact of the increased statutory minimum. Respondents simply increased the stipulated hourly rates in their agreements, leaving the weekly salary guarantees virtually the same and reducing the number of recorded hours of work to a number which would produce earnings at the increased hourly rates equal to the substantially unchanged weekly salary guarantees. In actual fact this was simply a record transaction and there was no change in the working hours of employees. Indeed, the stipulated hourly rates were not even accorded any significance secondary to the guarantee. The undisputed evidence in the record shows several isolated instances where employees were not paid their full weekly guarantee when they did not work every working day of the scheduled workweek. In these cases, instead of paying at the stipulated hourly rate for the recorded number of hours, the employees were paid at the rate of one-sixth of the weekly salary for each workday worked.

b. The decision below conflicts in principle with the decisions of two other courts of appeals.

McComb v. *Roig,* 181 F. 2d 726 (C. A. 1); *McComb* v. *Sterling Ice and Cold Storage Co.,* 165 F. 2d 265 (C. A. 10). In both of those cases, contracts patterned on the *Belo-Halliburton* type of contracts were held invalid because the stipulated hourly rate was arbitrarily fixed with the design and result that it would rarely, if ever, actually control the weekly compensation paid. In both the *Roig* and *Sterling* cases the terms of the contracts were, in pertinent respects, virtually identical to the pay plans here. In the *Roig* case the First Circuit construed this Court's decisions as requiring that the stipulated hourly rate and the maximum number of hours covered by the guarantee, be rationally related to the range of weekly hours customarily worked so that the stipulated hourly rate is actually operative to produce earnings in excess of the guarantee with sufficient frequency to demonstrate that it is not wholly fictitious. Despite the fact that in occasional instances some of the employees in the *Roig* case happened to earn in excess of their guarantees, so that the contracts there were not as obviously fictitious as respondents' contracts here, the court nevertheless held the contracts invalid. Referring to what it regarded as the even more clearly unlawful type of plan involved in the instant case, the court said (181 F. 2d at 729–730):

> It is possible, of course, that the relation between the hourly rate and the guaranty might be set by the employer with refer-

> ence not to a roughly estimated average workweek but to what the employer supposes would be the maximum possible workweek. In such a case, if the employer's forecast proved accurate, the workers would never exceed their guaranties; the purported hourly rate would never control the amount of the weekly pay and would pretty surely be found to be fictitious. * * *

Since it is undisputed (Stip. R. 72–73; Fdg. 8, R. 80) that in "no case did any" of the employees in the case at bar "work in excess of the guaranteed hours" (Fdg. 8, R. 80), and the hourly rates were never operative to produce earnings in excess of the guarantees (R. 21–41), it is evident that the contracts in the instant case would be held invalid in the First Circuit.

The decision below also conflicts with the ruling of the Tenth Circuit in the *Sterling Ice* case that the failure to attach any significance to the number of hours actually worked by employees, together with the fact that the employees never received any overtime payment in excess of their weekly guarantees, established the fictitious character of the contract. In that case, as in the instant case, the employer attached no importance to the hours actually worked by employees because it was apparent to him that the employees did not work as many hours as the maximum number covered by the contract weekly guarantee.

The court of appeals, reversing the district court's finding that the hourly rates were true "regular" rates, reasoned, in terms directly applicable here (165 F. 2d at 270):

> * * * This would indicate that no significance was attached to the number of hours which the employees were required to work. The hourly rate expressed in the contract could have no significance unless an accurate account was kept of the number of hours actually worked. The fact that no such records were kept would indicate that the company attached no significance whatever to the contracts or to the hourly rate or to the provision in the contract for one and one-half times such hourly rate for hours in excess of the maximum permitted by the Act, and that it considered the monthly salary as the true wage. So also it further appears in this case that in not a single instance was overtime payment paid in addition to the weekly guarantee provided for in the contract or the sum representing the semi-monthly salary of the employee.

As the court below recognized (Supp. R. 46), the amendment to Section 7 by the Fair Labor Standards Amendments of 1949 (*supra,* p. 12, n. 3) did not change the requirement that the "regular rate" be a true and not a fictitious rate. The 1949 Amendments, in subsection 7 (e), gave statutory recognition to the *Belo*-type contract, subject to certain specified limitations. The

above-cited decisions all related to pay plans antedating the 1949 Amendments. However, it has been the generally accepted view, consistently held by the Administrator, and by the lower federal courts which have passed upon the question, that the new Section 7 (e) simply codified the *Belo-Halliburton* type of pay plan subject to the same principles and limitations which this Court's subsequent decisions placed upon such pay plans. See *Interpretative Bulletin, Overtime Compensation,* 29 C. F. R., Part 778, 13 F. R. 4534; *Beechwood Lumber Co.* v. *Tobin,* 199 F. 2d 878 (C. A. 5); and the unofficially reported decisions in *Tobin* v. *Morristown Poultry Co.,* 10 W. H. Cases 571, 21 Labor Cases, ¶ 66,798 (E. D. Tenn., 1952); *Tobin* v. *Keystone Mfg. Co.,* 10 W. H. Cases 636, 21 Labor Cases, ¶ 66,911 (W. D. Ark., 1952); *Shure* v. *Rubenstein Bros. Jewelry Co.,* 10 W. H. Cases 657, 21 Labor Cases, ¶ 66,899 (N. D. Ill., 1952); *Tobin* v. *Wenatchee Air Service, Inc.,* 10 W. H. Cases 680, 21 Labor Cases, ¶ 67,019 (E. D. Wash., 1952); *Tobin* v. *Ewbank,* 11 W. H. Cases 354, 22 Labor Cases, ¶ 67,411 (W. D. Tenn., 1952); *Tobin* v. *Anthony-Williams,* 11 W. H. Cases 181, 22 Labor Cases, ¶ 67,278 (E. D. Ark., 1952).[4]

[4] That it was the intent of Section 7 (e) to validate only those contracts which were valid under the *Belo-Halliburton* test is indicated by the statement of Rep. Lucas who summarized the bill as passed by the House of Representatives. He concluded that Section 7 (e) was intended to give "spe-

The instant case presents an important question, since undue expansion of the *Belo* principle opens up an easy avenue of escape from the overtime provisions of the Fair Labor Standards Act. The decision below, unreversed, will lead to this result, for it disregards the limitations contained in the *Belo* case itself, as well as in the many subsequent cases in this Court and the courts of appeals applying the *Belo* doctrine.

2. In vacating the injunction, the decision below conflicts with this Court's decision in *United States* v. *Swift & Co.*, 286 U. S. 106. The departure from the principles of the *Swift* decision is particularly unjustifiable in the instant case because of the admitted recent violations of the injunction. Even if it be assumed that respondents' pay plan was not in violation of the Act or the injunction, it is undisputed that respondents at least violated the record-keeping requirements

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cific legislative approval to Belo type contracts (upheld by the United States Supreme Court)." 95 Cong. Rec. A5476. This is also the view of the Chamber of Commerce of the United States. See *What the 1949 Wage-Hour Act Means*, Employer-Employee Relations Division, Washington, D. C., November 1, 1949, where after noting the facts of the *Belo* case, the authors state: "This type of agreement was legalized under the original Act, but severely limited by the courts * * *. The new law reaffirms these decisions * * *" (at p. 11). See also *A "Belo" Primer for 1950*, by William Conant Brewer, Jr., C. C. H. Labor Law Journal, November 1949, p. 94. The author, after reviewing the *Belo*-type contract decisions, also reaches this conclusion. He states: "* * * it is unlikely that a guarantee which is never exceeded will be upheld, even under the statute" (at p. 160).

during the years immediately preceding the filing of the contempt proceeding.

The court below upheld the dissolution of the injunction on the ground that the record-keeping violations "were the result of an honest but mistaken belief" that the records were being kept in compliance with the Act and that there was no likelihood that the errors would recur in the future, citing as authority only *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419, 421, rehearing denied, 326 U. S. 804, and *Tobin* v. *Alma Mills,* 192 F. 2d 133, 136 (C. A. 4), certiorari denied, 343 U. S. 933. This reasoning is plainly inconsistent with the governing principles of the *Swift* case, to which the court below made no reference whatsoever, and neither of the decisions cited justifies the dissolution of the injunction under the circumstances present here.

In *Swift,* this Court, reversing the lower court's relaxation of a permanent consent decree, entered over ten years earlier in antitrust proceedings, held that the discretion of a court of equity to remove restraints imposed by a final decree is limited. While recognizing the inherent "power of a court of equity to modify an injunction in adaptation to changed conditions," this Court stated that a final disposition of litigation by permanent injunction "will not lightly be undone at the suit of the offenders," 286 U. S. at 114, 120. The opinion emphasized the need to keep "in mind steadily the limits of inquiry proper to the case,"

the Court specifically noting that: "We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree." 286 U. S. at 119. The scope of proper inquiry, said the Court, does not include "liberty to reverse under the guise of readjusting." *Ibid.* And general changes occurring merely by reason of the passage of time were expressly held inadequate grounds for relaxing the restraints. "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" (*ibid.*), said the Court, or a showing that the injunction "has been turned through changing circumstances into an instrument of wrong" (*id.* at 115), would justify removing the restraints.

Instead of requiring defendants to make a showing of tangible circumstances justifying release from the permanent decree, as required in the *Swift* case, the decision below would place upon plaintiff the burden of again proving affirmatively the need for an injunction as if an original decree were being framed.

The court's reliance upon *Walling* v. *Youngerman-Reynolds Co.*, 325 U. S. 419, makes it evident that it viewed the motion to vacate as if it presented the question of the need for an original injunction. The *Youngerman-Reynolds* decision, 325 U. S. at 421, held only that "voluntary discontinuance of an alleged illegal activity * * * may justify a court's refusal to enjoin future ac-

tivity of this nature when it is combined with a bona fide intention to comply with the law and not to resume the wrongful acts." But the *Swift* case specifically holds that this is not the rule to be applied to a motion to vacate a permanent injunction issued previously because of the likelihood of continued violations.

The reliance by the court below on *Tobin* v. *Alma Mills,* 192 F. 2d 133 (C. A. 4), certiorari denied, 343 U. S. 943, was, we submit, also misplaced. The Fourth Circuit's decision in that case was predicated upon the assumption that "radical changes" in the ownership and management of the defendant corporation had occurred, and upon the court's finding that "the owners of the stock of the company wished to sell it and that the fact that the company was subject to the injunction was interfering with the sale" (192 F. 2d at 134). There was, therefore, some possible basis for the conclusion that the dissolution of the injunction was consistent with the principles of the *Swift* case. In the instant case, on the other hand, it is clear that no such changed circumstances or hardships are present. Respondents have made no pretense of showing "new and unforeseen circumstances" or any "extreme and unexpected hardships" or any of the conditions prescribed in the *Swift* case.[5]

[5] Respondents alleged that the injunction is "unduly burdensome and onerous" (Response to the Order to Show Cause, R. 17), and one of respondents testified that both he and his father had attempted to "get the company released"

The sound reasons underlying the *Swift* decision are equally applicable here. There are indeed special reasons for applying the standards of the *Swift* case to injunctions under the Fair Labor Standards Act. The injunction is the only remedy now available to the Government "to require divestiture of [benefits] unlawfully acquired" by non-complying employers. Cf. *Schine Theatres* v. *United States,* 334 U. S. 110, 128. This is the sole effective means for meeting one of the most difficult problems of enforcement of this Act—the problem arising from the fear on the part of complying employers, particularly in the highly competitive industries regulated by the Act, that their less law-abiding or less conscientious competitors will secure and retain substantial competitive advantage by periodic or sporadic noncompliance, whether intentional or not. As this Court has observed, the criminal remedies

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from the injunction "because a plant does not like to be operating under injunction" (R. 69). Such expressions hardly rise to the dignity of proof necessary to establish that the injunction is working "extreme and unexpected hardship" or that the decree has been converted into "an instrument of wrong." Indeed the refutation of the charge that the injunction is "unduly burdensome and onerous" is contained in respondents' own testimony that, notwithstanding the existence of the injunction, "we have built up a lot of good will in this state with our products and our company" (R. 69). The district court placed some emphasis on the fact that there had been no investigation of respondents "for nearly nine years" (Fdg. 12, R. 82–83). This fact, far from showing that the injunction was unduly burdensome, seems strong evidence to the contrary.

are "for willful violations—difficult to prove" (*Brooklyn Bank* v. *O'Neil*, 324 U. S. 697, 709). The effectiveness of the employee remedy is haphazard, depending upon the initiative of particular employees and their willingness to risk incurring the disfavor of their employers. The injunction is the sole reliable remedy under the Act to prevent a prior offender from retaining advantages accruing from subsequent negligent or unintentional noncompliance. And it is now clear that the injunction must be outstanding in order for the restitution remedy to be available.[8] The restitution remedy has been the most effective spur to general voluntary compliance because it reduces to a minimum the danger of an unfair competitive advantage through noncompliance. As this Court has noted, it effectively places upon the employer "the risk of crossing the forbidden line" even though a court might find that he "had no purpose to evade the decree." *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 192, 193.

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[8] The 1949 amendment to Section 17 of the Fair Labor Standards Act expressly deprives the courts of jurisdiction to order restitution in an original action by the Government for an injunction (29 U. S. C., Supp. V, 217, Appendix, *infra*, p. 29). The Conference Report on the compromise version of the 1949 amendments, which was enacted, explains that this amendment was not "intended in any way to affect the court's authority in contempt proceedings for enforcement of injunctions issued under section 17 for violations occurring subsequent to the issuance of such injunctions" (H. Rep. 1453, 81st Cong., 1st Sess., p. 32).

Especially when it is considered that injunctions under this Act do not impose any restraint or obligation other than the basic requirements of the law impose in any event, the argument for more lenient standards fails. An injunction under this Act does not, as antitrust and other kinds of injunctions often do, impose restraints upon conduct that would under some circumstances be legal.[7] In such cases there is obviously more reason to relax restraints as conditions change.

The fact that in the instant case relatively few employees may have been affected and that the violations may have resulted from an "honest but mistaken belief" (a factor which apparently substantially influenced the court below), is not a sound reason for dissolving the injunction, as the *Swift* opinion itself demonstrates. In the *Swift* case, too, it was assumed that there were only "sporadic instances of unfair practices" which were "practices as to which the defendants' officers disclaim responsibility or knowledge." 286 U. S. at 118. Observing that "it is easy to make such excuses with plausibility," the Court ruled that "the difficulty of ferreting out these evils and repressing them when discovered supplies an

[7] Even though it appeared that the injunction in the *Swift* case imposed "restraints upon the exercise of powers that would normally be" within the defendant's legal rights (286 U. S. at 119), it was held an abuse of discretion to modify such restraints in the absence of "a clear showing of grievous wrong evoked by new and unforeseen conditions" (*ibid.*).

additional reason why we should leave the defendants where we find them" (*Id.* at 118–119). And respondents' good faith is obviously an even less valid reason for vacating the injunction than it would be for refusing to find civil contempt. See *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, 191; *McComb* v. *Norris*, 177 F. 2d 357, 359 (C. A. 4). In the *Jacksonville Paper Co.* case, this Court ruled that violation of an injunction constitutes civil contempt without regard to the question of whether the violations were intentional. "The absence of willfulness does not relieve from civil contempt * * *. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently" (336 U. S. at 191). *A fortiori,* the absence of willfulness is not a valid ground for relieving a contemnor from the restraint of a permanent injunction.

The extent of the additional enforcement problem created by the ruling below may be judged from the fact that there are over 6,000 injunctions outstanding, affecting less than 1% of the total number (over 700,000) of employer establishments covered by the Act. Since funds and personnel available for enforcement are, of course, limited and only a small fraction of the total number of covered establishments can be inspected, the inspection program must be most selectively planned. Because the pendency of an

injunction affords an added deterrent, it has in the past served as a dependable means of reducing the number of necessary investigations. The decision below, which sanctions unduly lenient standards for vacating injunctions, can seriously strain and disrupt the Department's available enforcement facilities.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

JETER S. RAY,
Acting Solicitor of Labor.

MAY 1953.

APPENDIX

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Act of October 26, 1949, c. 736, 63 Stat. 910, 29 U. S. C., Supp. V, 201, *et seq.*

MAXIMUM HOURS

Sec. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

(e) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less that one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

* * * * *

INVSTIGATIONS, INSPECTIONS, RECORDS, AND HOMEWORK REGULATIONS

Section 11. * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

* * * * *

PROHIBITED ACTS

Sec. 15 (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; * * *

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * *

(5) to violate any of the provisions of section 11 (c) or any regulation or order made or continued in effect under the provisions of section 11 (d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

INJUNCTION PROCEEDINGS

Sec. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction for cause shown, to restrain violations of section 15; *Provided,* That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

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